9-30-2008

Johnson v. Johnson Appellant's Brief Dckt. 35509

IN THE SUPREME COURT OF THE STATE OF IDAHO

LARRY C. JOHNSON,

Plaintiff/Respondent,

v.

CLAUDIA S. JOHNSON,

Defendant/Appellant.

Supreme Court Case No. 35509

APPELLANT'S BRIEF

On Appeal from the Third Judicial District of the State of Idaho, in and for the County of Canyon. The Honorable Stephen W. Drescher, District Judge, Presiding.

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TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES

Cases

Statutes

Rules

I. STATEMENT OF THE CASE

A. Nature of the Case

This Appeal addresses the issues of child custody jurisdiction under the Uniform Child Custody Jurisdiction Enforcement Act ("UCCJEA") and personal jurisdiction arising out of a divorce action. The Defendant/Appellant/Cross-Respondent Claudia Johnson ("Claudia") filed for divorce in the state of New York on October 5, 2006, where the parties and their children had resided for approximately eleven (11) years before relocating to Idaho for two and one-half months. The Plaintiff/Respondent/Cross-Appellant Larry Johnson ("Larry") filed for divorce in the state of Idaho on October 6, 2006. The magistrate court entered an Order on November 29, 2006, holding that Idaho did not have subject matter jurisdiction under the UCCJEA over child custody issues. On February 20, 2007, the magistrate subsequently dismissed the remaining issues raised in Larry's divorce action pursuant to Idaho Rule of Civil Procedure 12(b)(8) because the same issues were being addressed in parallel proceedings in the state of New York. Larry appealed the February 20, 2007 Order to the district court. The district court reversed both the November 29, 2006 Order and the February 20, 2007 Order. Claudia is appealing the Honorable Stephen W. Drescher's decision reversing the magistrate court.

B. Course of the Proceedings

Larry filed a Verified Complaint for Divorce on October 6, 2006 in Canyon County, Idaho. (R., Supp. Vol. I, p. 11.) The day before filing his divorce complaint, Larry was served

with a Summons and Notice for an Action for Divorce that was filed in Buffalo, New York, by Claudia. (R., Vol. I, p. 65.)

On October 20, 2006, Larry filed an *ex parte* Motion for an Order to Show Cause and Affidavit of Plaintiff in Support of Motion for Order to Show Cause. (R., Supp. Vol. I, pp. 7-17.) The magistrate judge signed the Order to Show Cause that was submitted *ex parte* and set the matter for hearing on October 30, 2006. (R., Supp. Vol. I, pp. 18-20.)

On October 27, 2006, Claudia filed a Limited Notice of Appearance. (R., Vol. I, p. 1.) On that same date, Claudia also filed a Motion to Quash Order to Show Cause, Affidavit of Claudia Johnson and Memorandum in Support of Motion to Quash Order to Show Cause Pursuant to the UCCJEA. (R., Vol. I, pp. 12-23.) Larry filed an Affidavit Re: Significant Connection and Substantial Evidence and a Memorandum Re: Jurisdiction. (R., Supp. Vol. I, pp. 21-57.)

On October 26, 2006, the New York court issued an Order to Show Cause granting temporary custody of the parties' minor children to Claudia and directing that the children could not be removed from New York until further order of the court. (R., Vol. I, p. 41-42.) The New York order was submitted to the Idaho court attached to the Affidavit of Mackenzie E. Whatcott on November 17, 2006. (R., Vol. I, pp. 39-42.)

The October 30, 2006 hearing date was rescheduled for November 17, 2006. (R., Vol. I, p. 1.)

On November 13, 2006, Claudia filed a Responding Affidavit Re: Jurisdiction of Claudia Johnson. (R. Vol. I, pp. 24-38.) On November 17, 2006, Claudia lodged a Supplemental

Memorandum Re: UCCJEA. (R., Vol. I, pp. 43-50.) Larry also filed the Supplemental Affidavit of Larry C. Johnson. (R., Supp. Vol. I, pp. 58-76.)

The magistrate court held a hearing to address Larry's Motion for Order to Show Cause and Claudia's Motion to Quash on November 17, 2006. (R., Vol. I, p. 51.) The magistrate court also participated in a telephone conference with the judge assigned to the divorce matter in the state of New York. (*Id.*) On November 29, 2006, the magistrate entered an Order finding that Idaho was not the "home state" under the UCCJEA that New York was the "home state" under the UCCJEA and declined jurisdiction over custody matters. (R., Vol. I, pp. 51-52.) The magistrate further found that New York had more significant contacts than Idaho. (*Id.*)

On December 18, 2006, Claudia filed a Motion to Dismiss Remaining Issues Pursuant to Idaho Rule of Civil Procedure 12(b)(8). (R., Vol. I, p. 1.) The motion was not scheduled for hearing. (*Id.*) On January 11, 2007, Claudia filed Defendant's Renewed Motion to Dismiss and the Affidavit of Mackenzie Whatcott in Support of Defendant's Motion to Dismiss. (R., Vol. I, pp. 53-58.) Claudia provided the magistrate court with an order issued from the New York court on January 2, 2007, wherein the court ordered that it had jurisdiction over all matters except for *in rem* jurisdiction over property in Idaho. (R., Vol. I, pp. 57-58.) The New York order further provided that Larry's motion to dismiss that had been filed by his attorney in New York was denied. (*Id.*)

On February 9, 2007, Larry filed Plaintiff's Objection to the Renewed Motion to Dismiss. (R., Supp. Vol. I, pp. 77-82.) On February 9, 2007, Claudia filed the Supplemental Affidavit of Mackenzie E. Whatcott attaching an amended order from the New York court that was entered

on February 7, 2007, that clarified that the court had personal jurisdiction over Larry pursuant to New York's long arm statute. (R., Vol. I, pp. 59-64.) On February 13, 2007, Claudia filed Defendant's Response to Plaintiff's Renewed Motion to Dismiss. (R., Vol. I, pp. 65-71.) The magistrate court held a hearing on the renewed motion to dismiss on February 14, 2007. (R. Vol. I, p. 2.) On February 20, 2007, the magistrate court entered an Order dismissing the remaining issues pursuant to Idaho Rule of Civil Procedure 12(b)(8). (R., Vol. I, pp. 72-74.)

On March 13, 2007, Larry filed a Notice of Appeal wherein he appealed the February 20, 2007 Order. (R. Vol. I, p. 75-78.) He did not appeal the November 29, 2006 Order regarding child custody jurisdiction. (*Id.*)

Larry filed Appellant's Brief on July 6, 2007. (R., Supp., Vol. I, pp. 83-107.) Claudia filed Respondent's Brief on August 6, 2007. (R. Vol. I., pp. 79-97.) On that same date, Claudia also filed a Motion to Dismiss Appeal, the Affidavit of Mackenzie E. Whatcott and the Memorandum in Support of Motion to Dismiss Appeal on the grounds that Larry's appeal was moot. (R., Vol. I, pp. 98-108.) Larry filed Appellant's Reply Brief on August 23, 2007. (R., Supp. Vol. I, pp. 108-120.)

On November 8, 2007, Larry filed the Affidavit of Larry Johnson and Plaintiff's Objection and Memorandum in Opposition to Defendant's Motion to Dismiss Appeal. (R., Supp. Vol. I, pp. 121-133, Supp. Vol. II, pp. 134-140.) Claudia filed Defendant's Response to Plaintiff's Objection and Memorandum in Opposition to Defendant's Motion to Dismiss Appeal on November 13, 2007. (R. Vol. I, pp. 109-115.)

On January 17, 2008, Larry submitted the Affidavit of Jennifer M. Schindele that attached the Memorandum entered by the New York court on or about January 10, 2008. (R., Supp. Vol. II, pp. 141-150.) The following day, Larry filed a Motion in Affidavit Form for Extension to Supplement Record and to Remand. (R. Vol. I, p. 4.) On January 25, 2008, Claudia filed the Affidavit of Mackenzie E. Whatcott. (R. Vol. I, p. 116-123.) The district court held a hearing on January 29, 2008 and the parties stipulated to allow Mr. Johnson more time to supplement the record. (R., Vol. I, p. 4.)

On February 5, 2008, Larry filed the Affidavit of James A. Bevis that attached an affidavit of Keith Kadish, Larry's first New York attorney. (R., Supp. Vol. II, pp. 151-161.)

On March 3, 2008, Larry filed a Motion in Affidavit Form for Extension to Supplement Record. (R., Vol. I, p. 4.) He also filed the Affidavit of James A. Bevis. (R., Supp. Vol. II, pp. 162-180.) On March 27, 2008, Claudia filed the Affidavit of Mackenzie E. Whatcott which attached the Judgment After Divorce Trial that was entered in the state of New York. (R., Vol. I, pp. 124-132.) On March 28, 2008, Larry filed the Affidavit of Roger T. Davison, the New York attorney he retained after terminating Keith Kadish. (R., Supp. Vol. II, pp. 181-183.)

The hearing on Larry's appeal and Claudia's motion to dismiss the appeal was held on April 9, 2008. (R. Vol. I, p. 4.) On that same day, Larry also filed the Affidavit of James A. Bevis. (R., Supp. Vol. II, pp. 184-192.)

The district court issued its Order on Appeal and Motion to Dismiss on May 2, 2008. (R. Vol. I, p. 133-137.) The district court reversed the magistrate's orders entered on November 29,

2006 and February 20, 2007 and remanded the matter for reconsideration consistent with this Court's decision in *Hopper v. Hopper*, 144 Idaho 624, 167 P.2d 761 (2007). (R., Vol. I, p. 136.)

On May 5, 2008, Larry filed a Motion for Automatic Disqualification. (R., Vol. I, p. 4.) The Order for Disqualification was entered on May 7, 2008 and the Honorable Debra Orr was disqualified. (R. Vol. I, p. 4). The Honorable James A. Schiller was assigned as the magistrate. (*Id.*)

Claudia filed a Motion to Reconsider, Memorandum in Support of Motion to Reconsider and Affidavit of Mackenzie E. Whatcott on May 19, 2008. (R. Vol. I, pp. 138-172.) Larry filed Plaintiff's Memorandum in Opposition to Defendant's Motion to Reconsider. (R. Supp. Vol. II, pp. 193-209.) On June 3, 2008, Claudia filed the Affidavit of Claudia Johnson in Response to Plaintiff's Memorandum in Opposition to Defendant's Motion to Reconsider and Defendant's Reply to Plaintiff's Memorandum in Opposition to Defendant's Motion to Reconsider. (R., Vol. I, p. 173-194.) Larry filed the Affidavit of Larry Johnson in Response to Defendant's Affidavit Filed on or about June 3, 2008. (R., Supp. Vol. II, pp. 210-220.)

On June 20, 2008, the district court entered its Order on Denying Motion for Reconsideration. (R. Vol. I, p. 195-196.)

On June 30, 2008, Larry filed a Motion for Temporary Orders and the Affidavit of Larry C. Johnson. (R., Supp. Vol. II, pp. 221-227.) On July 10, 2008, Claudia filed an Opposition to Plaintiff's Motion for Temporary Orders and Objection to Request for Trial Setting, the Affidavit of Claudia Johnson in Opposition to Plaintiff's Motion for Temporary Orders, and the Affidavit of Mackenzie E. Whatcott. (R. Vol. I, p. 5.)

On July 15, 2008, Larry filed Plaintiff's Memorandum in Response to Defendant's Opposition and Objection Filed on or about July 10, 2008. (R., Supp. Vol. II, pp. 228-249.) Claudia filed the Affidavit of Charles Messina on July 16, 2008. (R. Vol. I, p. 5.)

On July 17, 2008, Claudia filed the Notice of Appeal. (R. Vol. I, pp. 197-201.) On that same date, the magistrate court heard Larry's Motion for Temporary Orders. (R., Vol. I, p. 5.) The magistrate court issued its Order Denying Summer Visitation; Order Staying All Proceedings During Appeal; and Order Certifying Direct and Expedited Appeal on July 22, 2008. (R. Vol. I, pp. 202-207.)

Larry filed his Notice of Cross-Appeal on August 22, 2008. (R., Supp. Vol. II, pp. 250-255.)

C. Statement of Facts

Larry and Claudia were married on June 30, 1984, at Pittsburgh, Pennsylvania. (R., Vol. I, p. 173, ¶ 2.) Three children were born as issue of the marriage, and two of the children are under the age of majority. (*Id.*) The two minor children are [redacted] born [redacted] and [redacted] born [redacted] (*Id.*) The parties and their children resided in Buffalo, New York, for approximately eleven (11) years prior to Larry obtaining employment in Idaho. (R., Vol. I, p. 174, ¶ 3.) Larry traveled to Idaho in approximately December of 2005 to seek employment and moved to Idaho in January of 2006. (R., Supp. Vol. I, p. 24, ¶ 7.) Claudia and the children continued to live, work, and attend school in Buffalo, New York. Claudia and the children subsequently followed Larry to Idaho on July 18, 2006. (R., Vol. I, p. 21, ¶ 3.) Claudia and the children traveled to Pittsburgh, Pennsylvania

on October 3, 2006, and Claudia visited a lawyer in New York and filed for divorce on October 5, 2006. (R., Vol. I, p. 21.)

Larry had previously, throughout the marriage, obtained employment in foreign states when the family continued to reside in the state of New York and prior thereto when the parties resided in Pennsylvania. (R. Vol. I, p. 27.) Larry resided and worked at one point in New Orleans, Louisiana for approximately six (6) months. (*Id.*) On another occasion, he resided and worked in the state of Michigan for several months. (*Id.*) It was not uncommon throughout the course of the marriage for Larry to live in one state and the family to live in another. (*Id.*)

Claudia was not anxious about relocating to Idaho. (R., Vol. I, p. 26.) Larry unilaterally began looking for houses and found a home, purchased the home, signed the mortgage and sales agreement; all done without Claudia's knowledge or consent. (R. Vol. I, p. 27.)

Claudia and the children followed Larry to Idaho on July 18, 2006. (R., Vol. I, p. 21, ¶ 3.) The girls were extremely unhappy in Idaho. (R., Vol. I, p. 28.) [redacted] did not eat her lunch for the first two weeks she was there and had no friends to sit with at lunch or friends to play with at recess. (*Id.*)

As set forth above, Claudia and the children returned to Buffalo, New York on October 3, 2006. (R., Vol. I, p. 21, ¶ 3.) Only a few days after arriving in New York, Claudia found that her access to the parties' Wells Fargo checking and savings accounts, First Niagara checking accounts, Platinum Visa account, American Express account, Bank of America Platinum Visa account, Exxon Mobil account, Macy's account and Brook's Brother's account had all been frozen. (R., Vol. I, p. 25.)

On October 20, 2006, Larry filed an *ex parte* Motion for an Order to Show Cause and Affidavit of Plaintiff in Support of Motion for Order to Show Cause in Idaho. (R., Supp. Vol. I, pp. 7-17.) The magistrate judge signed the Order to Show Cause that was submitted *ex parte* and set the matter for hearing on October 30, 2006. (R., Supp. Vol. I, pp. 18-20.) The hearing on the Order to Show Cause originally scheduled for October 30, 2006, was rescheduled for November 17, 2006. (R., Vol. I, p. 1.)

On October 26, 2006, the New York court issued an Order to Show Cause granting temporary custody of the parties' minor children to Claudia and directing that the children could not be removed from New York until further order of the court. (R., Vol. I, p. 41-42.)

On November 17, 2006, the magistrate court held a hearing to address Larry's Motion for Order to Show Cause and Claudia's Motion to Quash. (R., Vol. I, p. 51.) The magistrate court also participated in a telephone conference with the judge assigned to the divorce matter in the state of New York. (*Id.*) On November 29, 2006, the magistrate entered an Order finding that Idaho was not the "home state" under the UCCJEA and that New York was the "home state" under the UCCJEA and declined jurisdiction over custody matters. (R., Vol. I, pp. 51-52.) The magistrate further found that New York had more significant contacts than Idaho. (*Id.*) Larry did not appeal this determination. (R., Vol. I, pp. 51-52.)

On January 2, 2007, the New York court entered an order denying Larry's motion to dismiss the divorce action in New York. (R., Vol. I, pp. 57-58.) The New York court also ordered that it was retaining jurisdiction over the entire case except for "in rem jurisdiction over any property of the parties which is physically located in the State of Idaho." (*Id.*) The New

York court subsequently issued an amended order on February 7, 2007, finding that it had personal jurisdiction over Larry pursuant to New York's long arm statute. (R., Vol. I, pp. 59-64.) The New York orders were submitted to the magistrate court in Idaho. (*Id.*)

The magistrate court held a hearing on Claudia's Renewed Motion to Dismiss the remaining issues in Larry's divorce action on February 14, 2007. (R. Vol. I, p. 2.) On February 20, 2007, the magistrate court entered an Order dismissing the remaining issues pursuant to Idaho Rule of Civil Procedure 12(b)(8). (R., Vol. I, pp. 72-74.)

The Court found that Claudia filed her action first in New York, that the Idaho court was without subject matter jurisdiction to decide custody matters, and that there was pending litigation over the same issues in New York:

> An order's already issued in New York saying they have jurisdiction over everything. I did reserve the issue of in rem jurisdiction which is the only reason I set it out for hearing date is if we had some hearing on the real property that we had sitting here.
>
> ...
>
> And what I don't want to happen is to have two courts in two separate states issuing two separate orders on who has jurisdiction. If New York doesn't have jurisdiction over you and this gets set aside, you certainly can come back here and do that.
>
> ...
>
> I believe the 12(b)(8) action does refer to out-of-state – pending in another state and I don't want to have two separate dueling factors.

(R., Supp., Vol. II, p. 176, Tr., pp. 30-31.)

On or about March 13, 2007, Larry filed a Notice of Appeal wherein he appealed the February 20, 2007 Order to the district court. Larry argued on appeal that the New York court

did not have personal jurisdiction over him. (R., Vol. I, pp. 75-78; Supp. Vol. I, pp. 83-107.) He did not appeal the November 29, 2006 Order regarding custody jurisdiction. (*Id.*)

While all of the above litigation was pending in Idaho, litigation continued in New York. Larry appeared for his divorce trial in New York on November 13 and 14, 2007. (R., Vol. I, pp. 116-132, 155-172.) The parties entered into a stipulated custody schedule on November 13, 2007 and tried other issues before the New York court on November 14, 2007. (R., Vol. I, pp. 157-172.) The New York court issued an order on custody on December 18, 2007.[1] (R., Vol. I, pp. 157-172.)

Larry retained an attorney by the name of Keith Kadish who entered a limited appearance in the New York case for the sole purpose of contesting the custody jurisdiction on December 1, 2006. (R., Vol. I, p. 106.) This appearance specifically provides that he was appearing on the issues of custody and child support. (*Id.*) Larry never objected to this limited appearance until Claudia raised the issue on her Motion to Dismiss the Appeal. Mr. Kadish filed a second appearance in the New York case, which was a general appearance, on April 20, 2007. (R., Vol. I, p. 107.) Larry voluntarily subjected himself to the jurisdiction of New York.

Claudia filed the motion to dismiss Larry's appeal on August 6, 2007, on the grounds that Larry's appeal was moot. (R., Vol. I, pp. 98-108.) Larry's appeal to the district court was based upon his argument that New York did not have personal jurisdiction over him and therefore the magistrate should not have relied upon its order when it dismissed the remaining issues in

[1] The final Order resolving all issues was entered March 18, 2008, more than a year after the magistrate court issued its February 20, 2007 and while Larry's appeal was pending before the district court. (R., Vol. I, pp. 126-132.)

Idaho.[2] After Larry filed his appeal to the district court, he entered a general appearance in New York on April 20, 2007. (R., Vol. I., pp. 107-108.) Therefore, the appeal became moot in light of the fact that Larry had entered a voluntary appearance in New York. (R., Vol. I, pp. 104-108.)

On May 2, 2008, the district court entered its Order on Appeal and Motion to Dismiss wherein the court reversed the November 29, 2006 Order and the February 20, 2007 Order, citing to this Court's decision in *Hopper v. Hopper*, 144 Idaho 624, 167 P.3d 761 (2007), and remanded the case to the magistrate court. (R., Vol. I, pp. 133-37.)

Claudia filed a Motion to Reconsider that was denied on June 20, 2008. (R. Vol. I, p. 195-196.)

On July 17, 2008, Claudia filed the Notice of Appeal. (R. Vol. I, pp. 197-201.) Larry filed a Cross-Appeal on August 22, 2008. (R., Supp. Vol. I, pp. 250-255.)

II. ISSUES ON APPEAL

A. Did the district court err by reversing the November 20, 2006 Order on child custody jurisdiction which was an order that was not appealed from and addressed an issue that was not raised on appeal?

B. Does Idaho have subject matter jurisdiction over custody issues under the UCCJEA?

C. Did the district court err by reversing the magistrate's dismissal under Idaho Rule of Civil Procedure 12(b)(8)?

D. Did the district court err by denying the Motion to Dismiss Appeal?

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[2] Claudia's continues to take the position that the magistrate court did not *rely* on the New York order as the sole basis for its dismissal under Rule 12(b)(8) and that Larry's appeal to the district court fails for the reasons set forth in more detail below.

III. LEGAL ARGUMENT

A. Standard of Review.

Where the issues presented were first decided in the magistrate division and then presented to the district court on appeal, the Court reviews the magistrate's decision independent of, but with due regard for, the district court's appellate decision. *Noble v. Fisher*, 126 Idaho 885, 888, 894 P.2d 118, 121 (1995).

Findings of fact made by the trial court will not be set aside unless they are clearly erroneous. *Rohr v. Rohr*, 118 Idaho 689, 691, 800 P.2d 85, 87 (1990). Thus, any findings of fact will not be disturbed on appeal if supported by substantial and competent evidence, even though such evidence may be conflicting. *Id.; Quiring v. Quiring*, 130 Idaho 560, 563, 944 P.2d 695, 698 (1997). Questions of law are reviewed on appeal freely. *Bliss v. Bliss*, 127 Idaho 170, 172, 898 P.2d 1081, 1083 (1995). Jurisdiction is a question of law over which the Court exercises free review. *Pizzuto v. State*, 127 Idaho 469, 471, 903 P.2d 58, 60 (1995); *State v. Barros*, 131 Idaho 379, 381, 957 P.2d 1095, 1097 (1998).

The trial court's determination under Idaho Rule of Civil Procedure. 12(b)(8) whether to proceed with an action where a similar case is pending in another court is discretionary. *Klaue v. Hern*, 133 Idaho 437, 988 P.2d 211 (1999); *See Zaleha v. Rosholt, Robertson & Tucker, Chtd.*, 129 Idaho 532, 533, 927 P.2d 925, 926 (Ct.App. 1996). This decision will not be overturned on appeal unless the trial court abuses its discretion. *Id.* When a trial court's discretionary decision is reviewed on appeal, the appellate court considers:

> (1) whether the lower court correctly perceived the issue as one of discretion; (2) whether the lower court acted within the boundaries of such discretion and consistently with any legal standards applicable to the specific choices before it; and (3) and whether the court reached its decision by an exercise of reason.

Id. (citing *Sun Valley Shopping Ctr., Inc. v. Idaho Power, Inc.*, 119 Idaho 87, 94, 803 P.2d 993, 1000 (1991)).

B. The District Court Erred by Dismissing the November 29, 2006 Order Regarding Child Custody Jurisdiction Because it was an Order that was Not Appealed From and Addressed an Issue that was Not Raised on Appeal.

The district court reversed the magistrate court's November 29, 2006 Order wherein the magistrate court found that Idaho did not have subject matter jurisdiction over child custody issues under the UCCJEA. (R., Vol. I, pp. 133-137.) Larry did not appeal that order, but appealed only the February 20, 2007 Order. (R., Vol. I., pp.75.) The Notice of Appeal filed by Larry on March 19, 2007 provides only that Larry was appealing, "Order Re: Defendant's Motion to Dismiss, entered February 20, 2007." (*Id.*) Moreover, the issue of child custody jurisdiction was not raised on appeal. Larry argued in his Appellant's Brief that Idaho had subject matter jurisdiction over the issues of "property and debt, divorce, child support and spousal maintenance." (R., Supp. Vol. I, p. 94.) Larry did not argue that Idaho had subject matter jurisdiction over *custody* issues. The district court erred by reversing the November 29, 2006 Order because the issue of child custody subject matter jurisdiction was not before the court on appeal. Idaho Rule of Civil Procedure 83(u)(1) provides,

> The scope of appellate review on an appeal to the district court shall be as follows:

> (1) Upon an appeal from the magistrate's division of the district court, not involving a trial de novo, the district court shall review the case on the record and determine the appeal as an appellate court in the same manner and upon the same standards of review as an appeal from the district court to the Supreme Court under the statutes and law of this state, and the appellate rules of the Supreme Court.

This Court has held that it will not consider issues raised for the first time on appeal. *KEB Enterprises, L.P. v. Smedley*, 140 Idaho 746, 752, 101 P.3d 690, 696 (2004). In this case, the November 29, 2006 Order was not appealed from nor was the issue of child custody jurisdiction raised on appeal.

C. Idaho Does Not Have Subject Matter Jurisdiction Under the UCCJEA.

1. The district court erred by relying on the *Hopper* decision as grounds for reversing the child custody jurisdiction determination under the UCCJEA.

The district court relied solely on this Court's decision in *Hopper v. Hopper*, 144 Idaho 624, 167 P.3d 761 (2007) in reversing the November 29, 2006 Order and the February 20, 2007 Order, as well as denying Claudia's Motion to Dismiss Appeal. The *Hopper* decision is not applicable to the facts of this case because Idaho does not have subject matter jurisdiction under the UCCJEA and therefore cannot make any child custody determinations.

In *Hopper*, the mother unilaterally relocated from Idaho to Montana with the parties' infant child and filed for divorce. It was determined early in the proceedings that the divorce action would be litigated in Idaho because Idaho had jurisdiction as the Court stated, "The Montana actions were consolidated and eventually dismissed on August 14, 2003 *in deference to Idaho's jurisdiction over the matter.*" *Hopper*, 144 Idaho at __, 167 P.3d at 762 (emphasis

added). In another recent case, *Schultz v. Schultz*, 145 Idaho 859, 187 P.3d 1234 (2008), the parties had been residing in Idaho before the wife fled to Oregon and sought a protection order. The Idaho and Oregon courts then agreed that jurisdiction was proper in Idaho. *Schultz*, 187 P.3d at 1234. Therefore, a determination was made, after conferring with the Oregon court, that Idaho had child custody jurisdiction. In this case however, Idaho does not have subject matter jurisdiction over child custody and cannot make any custody determinations under the UCCJEA.

On November 29, 2006, the magistrate court entered an Order, after holding a telephonic hearing with the New York court, and determined that New York and not Idaho is the "home state." (R., Vol. I, pp. 51-52.) The court also found that New York and not Idaho had the most significant contacts under the UCCJEA. (*Id.*) The district court erred in reversing the magistrate's November 29, 2006 Order on the basis of the *Hopper* decision because Idaho does not have jurisdiction over custody issues like the court did in *Hopper*. Moreover, the district court never addressed the UCCJEA or explained how Idaho had subject matter jurisdiction over child custody issues.

Secondly, the *Hopper* case is further inapplicable to this case because Larry and Claudia stipulated to all custody matters in New York. (R., Vol. I, pp. 155-172.) The parties stipulated to a custody schedule on November 13, 2007 and an Order was entered on December 18, 2007. (*Id.*)

Recently, this Court distinguished the *Hopper* case in *Navarro v. Yonkers*, 144 Idaho 882, 173 P.3d 1141 (2007). In *Navarro*, the parties had one minor child, but were never married. Without giving notice to the father, the mother relocated to Nevada with their minor child.

Mother then filed for a temporary restraining order in Nevada and the father filed a custody petition in Idaho. Later, the parties stipulated to an interim custody order in December of 2004 and an order was subsequently entered awarding mother legal and physical custody. The final custody decree was entered on March 31, 2006. On appeal, the father argued that the court erred by treating mother's unilateral move from Idaho to Nevada as a factor in the physical custody award rather than a determinative condition and argued that under *Hopper* it violated his rights. This Court rejected his argument because he was able to maintain a relationship with the child via the custody order that was entered by stipulation and therefore his equal rights were not prejudiced. In this case, the parties have stipulated to custody and therefore Larry's equal rights have not been violated and *Hopper* is inapplicable.

The district court erred by reversing the November 29, 2006 Order; it failed to address the UCCJEA in its decision and made no finding that Idaho had subjection matter jurisdiction over custody issues.

2. Home State Jurisdiction Under the UCCJEA.

Idaho and New York[3] have enacted the UCCJEA. Idaho Code § 32-11-201 provides in pertinent part:

> (a) Except as otherwise provided in section 32-11-204, Idaho Code, a court of this state has jurisdiction to make an initial child custody determination only if:
>
> (1) This state is the home state of the child on the date of the commencement of the proceeding, or was the home state of the child within six (6) months before the commencement of the proceeding and the child is absent from

[3] See Domestic Relations Law, Article 5-A.

> this state but a parent or person acting as a parent continues to live in this state;
> (2) A court of another state does not have jurisdiction under paragraph(1) of this subsection, or a court of the home state of the child has declined to exercise jurisdiction on the ground that this state is the more appropriate forum under section 32-11-207 or 32-11-208, Idaho Code, and:
> (A) The child and the child's parents, or the child and at least one (1) parent or a person acting as a parent, have a significant connection with this state other than mere physical presence; and (B) Substantial evidence is available in this state concerning the child's care, protection, training and personal relationships;

IDAHO CODE § 32-11-201. "This section provides mandatory jurisdictional rules for the original child custody proceeding." UCCJEA Official Comment § 204. The Official Comments further states:

> It should also be noted that since jurisdiction to make a child custody determination is subject matter jurisdiction, an agreement of the parties to confer jurisdiction on a court that would not otherwise have jurisdiction under this Act ineffective.

UCCJEA Official Comment § 204.

The state of Idaho does not meet the definition of the "home state" as set forth in Idaho Code § 32-11-201(a)(1). The UCCJEA defines "home state" as follows:

> [T]he State in which a child lived with a parent or a person acting as a parent for at least six consecutive months immediately before the commencement of a child-custody proceeding. In the case of a child less than six months of age, the term means the State in which the child lived from birth with any of the persons mentioned. A period of temporary absence of any of the mentioned persons is part of the period.

Idaho Code § 32-11-102(g). Claudia and the children moved to Idaho for the first time from Buffalo, New York, on July 18, 2006. (R., Vol. I, p. 21, ¶ 3.) Prior to moving to Idaho, the parties and their children had resided in Buffalo, New York for approximately eleven (11) years. (R., Vol. I, p. 174, ¶ 3.) Pursuant to I.C. § 32-11-201(a)(1), Idaho was not the "home state" at the time the proceedings were filed, nor was it ever the "home state," as the children had only lived in Idaho for a total of approximately two and one half months.

New York is the "home state" under this provision, because New York was the "home state" of the children "within six months before the commencement of the proceeding and the child is absent from this State but a parent or person acting as a parent continues to live in this State." Idaho Code § 32-11-201(a)(1).

While there does not appear to be any case law in Idaho directly on point, other jurisdictions that have adopted the UCCJEA have addressed this issue. The issue presented in this case was addressed by the Arizona Court of Appeals in *Welch-Doden v. Roberts*, 202 Ariz. 201, 42 P.3d 1166 (2002). In *Welch-Doden*, the mother and father were married in Arizona in 1996. They later relocated to Oklahoma and their first child was born there in 1999. After the child was born, the mother and child moved back and forth between Arizona and Oklahoma. Mother asserted that she and her husband intended to resume their residence in Arizona. On her last return to Arizona, mother claims that she was waiting for the father to join her. When he did not, she filed for divorce.

The timetable of the child's residence since birth until the filing of the petition was as follows:

> Oklahoma from birth on April 28, 1999 and for the next seven and one-half months (April 1999-December 1999); Arizona for three months (December 1999-March 2000); Oklahoma for six months (March 2000-September 2000); Arizona for the four months prior to the filing of the petition (September 2000-January 25, 2001). At all times, the child was with its mother.

Welch-Doden, 202 Ariz. at 203, 42 P.3d at 1168.

Mother filed for dissolution and custody on January 25, 2001 in Arizona. On February 8, 2001, two days after being served with notice of the Arizona petition, father filed a petition for divorce and custody in Oklahoma. On March 7, 2001, father appeared specially in Arizona to move to dismiss the Arizona petition for lack of jurisdiction. An evidentiary hearing was held on August 21, 2001. After hearing from both sides and conferring with the Oklahoma trial judge, the trial judge ruled that Oklahoma had home state jurisdiction pursuant to the UCCJEA. The trial judge determined Oklahoma had been the child's home state within the six months before the petition was filed (but not the home state for the six-month period immediately prior to the filing). The Court of Appeals affirmed, explaining:

> Given the fundamental purpose of the UCCJEA to establish certainty of home state jurisdiction, it is clear to us that § 25-1031(A)(1) acts to enlarge and modify the definition of home state under § 25-1002(7)(a). We hold that "home state" for purposes of determining initial jurisdiction under § 25-1031(A)(1) is not limited to the time period of "six consecutive months immediately before the commencement of a child custody proceeding[.]" A.R.S. § 25-1002(7)(a). Instead, the applicable time period to determine "home state" in such circumstances is "within six months before the commencement of the [child custody] proceeding." A.R.S. § 25-1031(A)(1). This interpretation promotes the priority of home state jurisdiction that the drafters specifically intended.

Welch-Doden, 202 Ariz. at 209, 42 P.3d at 1174.

While the facts in the case at hand are not as complicated as those set forth in *Welch-Doden*, the timetable presented here is clear. Prior to moving to Idaho on July 18, 2006, the children and their mother lived in New York for approximately eleven (11) years. (R., Vol. I, p. 174, ¶ 3.) The parties and their children had not even lived in Idaho for six months, therefore, pursuant to the UCCJEA, the magistrate court properly looked back to the six months period prior to the commencement of Larry's divorce action to determine if there was a state that would qualify as the home state. Within the six months preceding the divorce action there was a "home state" because the parties and their children had lived in New York, within the last six months, for a period of approximately eleven (11) years.

In *Stephens v. Fourth Judicial District Court*, 331 Mont. 40, 128 P.3d 1026 (2006), the parties were married in Montana and had two children between the years 1999 and 2002. In 2002, the family moved to Arkansas and lived there for approximately three years. In the spring of 2005, the family returned to Montana. The parties took steps at that time that would imply that they intended the move to Montana to be permanent, like enrolling their children in school, obtaining driver's licenses and opening a bank account.

In August of 2005, approximately three months later, the mother left with the two children and returned to Arkansas. Father filed for divorce in Montana on August 10, 2005. The Montana Supreme Court first looked at the definition of "home state" as defined in the UCCJEA that provides:

> "Home state" means the state in which a child lived with a parent or a person acting as parent for at least 6 consecutive months immediately before the commencement of a child custody proceeding. In the case of a child less than 6 months of age, the term means the state in which the child lived from birth with any of the persons mentioned. A period of temporary absence of any of the mentioned persons is part of the period.

M.C.A. § 40-7-103(7). This is the same definition as the Idaho and New York statutes.

The Montana Supreme Court looked first to the purpose behind the UCCJEA and explained that the UCCJEA sought to increase uniformity in state laws regarding jurisdiction and custody matters and to avoid disputes between competing jurisdictions. The court stated, "The drafters intended that the UCCJEA should be construed to promote one of its primary purposes of avoiding jurisdictional competition and conflict that flows from hearings in competing states when each state substantively reviews subjective factors, such as 'best interests.'" *Stephens,* 128 P.3d at 1029. The court ultimately found that Arkansas was the home state, explaining:

> "home state" for purposes of determining initial jurisdiction under § 40-7-201(1), MCA, is not limited to the time period of "6 consecutive months immediately before the commencement of a child custody proceeding." The applicable time period to determine "home state" in such circumstances should be "within 6 months before the commencement of the [child custody] proceeding. Section 40-7-201(a)(1). This interpretation promotes the priority of home state jurisdiction that the drafters of the UCCJEA specifically intended.

Stephens, supra. It further explained:

> [Mother] removed the children from Montana in August of 2005, thereby stopping the six-month clock needed to establish Montana as the "home state for purposes of the UCCJEA. The District Court and [Father] put much stock in the fact that the parties took steps that would imply their intention to make a permanent move to Montana in 2005. Regardless of their intention, however, the

> fact remains that Brenda removed the children from Montana in August 2005 and returned them to their "home state" of Arkansas at that time. Thus, Arkansas was the children's "home state" under the UCCJEA when the family came to Montana in May 2005, and remained their "home state under the UCCJEA when they returned to Arkansas in August of 2005.

(*Id.*) The facts in *Stephens* parallel the facts in this case. The magistrate court properly looked back six months prior to the commencement of the action and determined that New York was the "home state" pursuant to the UCCJEA.

3. Significant Contacts Jurisdiction Under the *UCCJEA*.

The magistrate court further found that not only was New York the "home state," but in the alternative New York had jurisdiction under I.C. § 32-11-201(2) because it had the most significant contacts. Pursuant to Idaho Code §32-11-201(2), the Court must consider:

> (A) The child and the child's parents, or the child and at least one (1) parent or a person acting as a parent, have a significant connection with this state other than mere physical presence; and
>
> (B) Substantial evidence is available in this state concerning the child's care, protection, training and personal relationships;

IDAHO CODE § 32-201(2).

The primary purpose of the UCCJEA is to avoid jurisdictional competition and is designed to prevent the significant contacts analysis and prefers a "home state" analysis in order to avoid disputes exactly like these. Nonetheless, even under a significant contacts approach, Claudia and the children have more significant contacts in New York than in Idaho.

Both Larry and Claudia submitted affidavits to the magistrate court regarding significant contacts. The contacts set forth by Larry related to his personal contacts with the state of Idaho,

rather than the contacts of Claudia and the children. It is simply not plausible that the parties and their children could have established more contacts with a state in which they had resided for only two and one-half months as opposed to New York where they had lived for eleven years. The parties and their children have long-established friendships, employment history, educational history, medical history, and residential history in New York. (R., Vol. I, pp. 24-38.) The magistrate court did not abuse its discretion by alternatively finding that New York had subject matter jurisdiction over custody issues under the significant contacts analysis.

D. The District Court Erred by Reversing the Magistrate's Dismissal Under Idaho Rule of Civil Procedure 12(b)(8).

The magistrate court did not abuse its discretion when it dismissed the remaining issues in Larry's divorce action pursuant to Idaho Rule of Civil Procedure 12(b)(8). The district court made no finding that the magistrate court abused its discretion. The district court erred in reversing the February 20, 2007 Order.

Rule 12(b)(8) allows a party to raise as a defense the fact that "another action pending between the same parties for the same cause." In light of other litigation, it is within the court's discretion whether to proceed with the case. *See Wing v. Amalgamated Sugar Co.*, 106 Idaho 905, 908, 684 P.2d 307, 310 (Ct.App.1984), *overruled on other grounds by, NBC Leasing Co. v. R&T Farms, Inc.*, 112 Idaho 500, 733 P.2d 721 (1987). When considering an Idaho Rule of Civil Procedure 12(b)(8) motion to dismiss, only "two tests govern the determination of whether a lawsuit should proceed where a similar lawsuit is pending another court." *Klaue v. Hern*, 133 Idaho 437,440, 988 P.2d 211, 214 (1999); *see also Wing v. Amalgamated Sugar*, 106 Idaho 905,

908, 684 P.2d 307, 310 (Ct.App. 1984). "First the court should consider whether the other case has gone to judgment, in which event the doctrines of claim preclusion and issue preclusion may bar additional litigation." *Id.* "The second test is whether the court, although not barred from deciding the case, should nevertheless refrain from deciding it." *Id.* Furthermore, "the determination of whether to proceed with a case where a similar case is pending elsewhere, and has not gone to judgment, is discretionary, and will not be overturned absent an abuse of that discretion." *Id.*

"When a court is called upon to *enforce* a foreign judgment, it may inquire into the jurisdictional basis of the foreign court's decree to determine whether full faith and credit must be accorded." *Burns v. Baldwin*, 138 Idaho 480, 65 P.3d 502 (2003); *Schwilling v. Horne*, 105 Idaho 294, 297, 669 P.2d 183, 186 (1983)(quoting *Underwriters Nat'l Assurance Co. v. North Carolina Life & Accident & Health Ins. Guaranty Ass'n,* 455 U.S. 691, 102 S.Ct. 1357, 71 L.Ed.2d 558 (1982)(emphasis added).

The magistrate court was not called upon to *enforce* the New York court's order nor was Claudia seeking to register the order in Idaho. Rather the magistrate court only needed to determine whether there was pending litigation in another state that addressed the same issues. Specifically, the factors that the court is to consider on a Rule 12(b)(8) motion are as follows:

> In deciding whether to exercise jurisdiction over a case when there is another action pending between the same parties for the same cause, a trial court must evaluate the identity of the real parties in interest and the degree to which the claims or issues are similar. The trial court is to consider whether the court in which the matter already is pending is in a position to determine the whole controversy and to settle all the rights of the parties. Additionally,

> the court may take into account the occasionally competing objectives and judicial economy, minimizing costs and delay to litigants obtaining prompt and orderly disposition of each claim or issue, and avoiding potentially inconsistent judgments.

Diet Ctr., Inc. v. Basford, 124 Idaho 20, 22-23, 855 P.2d 481, 483-84 (Ct. App. 1993).

The magistrate court did not abuse its discretion by granting Claudia's motion to dismiss. On February 20, 2007, the magistrate court entered its order granting Claudia's dismissal pursuant to Idaho Rule of Civil Procedure 12(b)(8). (R., Vol. I, pp.72-74.) As set forth above, Rule 12(b)(8) allows a party to raise as a defense the fact that "another action pending between the same parties for the same cause." In light of other litigation, it is within the court's discretion whether to proceed with the case. *See Wing v. Amalgamated Sugar Co.*, 106 Idaho 905, 908, 684 P.2d 307, 310 (Ct.App.1984), *overruled on other grounds by, NBC Leasing Co. v. R&T Farms, Inc.*, 112 Idaho 500, 733 P.2d 721 (1987). Additionally, another important factor is "whether the other court has already exercised jurisdiction." *Zaleha v. Rosholt, Robertson & Tucker, Chtd.*, 129 Idaho 532, 534 927 P.2d 925, 928 (1996).

Considering the foregoing, the magistrate court reviewed the appropriate factors and found:

> Ms. Johnson has moved with the children back to New York. (R., Supp., Vol. II, p. 176, Tr., p. 4, L. 10-11.)
> ...
>
> Ms. Johnson did file first in New York... (R., Supp., Vol. II, p. 176, Tr., p. 30, L. 16-19.)
> ...
> And what I don't want to happen is to have two courts in two separate states issuing two separate orders on who has jurisdiction.

> If New York doesn't have jurisdiction over you and this gets set aside, you certainly can come back in here and do that. (R., Supp., Vol. II, p. 176, Tr., p. 31, L. 8-12.)
> ...
>
> An order's already issued in New York saying they have jurisdiction over everything. (R., Supp., Vol. II, p. 176, Tr., p. 30, L. 16-19.)
> ...
>
> I did make the finding after having a hearing with Justice O'Donnell and the attorneys in New York and the attorneys here that I did not have child custody jurisdiction. Thus for, I didn't have subject matter jurisdiction either according to the Uniform Child Custody Jurisdiction Act. (R., Supp., Vol. II, p. 176, Tr., p. 30, L. 19-24.)

The magistrate court considered the relevant legal factors under Rule 12(b)(8) and acted within the bounds of its discretion by considering the factors above. The magistrate reached its decision through an exercise of reason. Therefore, the district court erred in reversing this order and further made no finding how the magistrate court abused its discretion.

E. The District Court Erred by Denying the Motion to Dismiss the Appeal.

The district court denied Claudia's Motion to Dismiss Appeal and cited to the *Hopper* decision. It is not clear how *Hopper* applies to the issues presented on the Motion to Dismiss the Appeal. The Motion to Dismiss Appeal was brought on the grounds of mootness.

Larry's appeal to the district court alleged that the New York court did not have personal jurisdiction over him and therefore the Idaho Court improperly deferred to the New York court's decision. Larry's personal jurisdiction argument is moot because after he filed his appeal to the district court on March 19, 2007, he entered a voluntary appearance in New York on April 20,

2007. Larry's New York attorney, Keith Kadish, entered not one, but two appearances in New York, thereby subjecting Larry to the jurisdiction of the New York court. The first Notice of Appearance entered on December 1, 2006, clearly provides that Larry was appearing on the issues of custody and support. (R., Vol. I, p. 106.) The second appearance, entered on April 20, 2007 is a general appearance and thereby further waives personal jurisdiction as to all of the remaining property and support issues. (R., Vol. I, pp. 107-08.)

The court may dismiss an appeal when it appears that only a moot question is involved. *Downing v. Jacobs*, 99 Idaho 127, 578 P.2d 243 (1978); *citing Tryon v. Baker*, 94 Idaho 222, 485 P.2d 964 (1972); *Graves v. Berry*, 35 Idaho 498, 207 P. 718 (1922). "In making this determination, this court may properly consider facts arising after the entry of the judgment appealed. *Downing*, 99 Idaho at 128, 578 P.2d at 244.

"The voluntary appearance of a party or service of any pleading by the party, except as provided herein, constitutes voluntary submission to the personal jurisdiction of the court." I.R.C.P. 4(i). The Idaho Court of Appeals has stated, "If a jurisdictional objection was not asserted by motion or answer at the time of the appearance, the objection was waived." *Donaldson v. Donaldson*, 111 Idaho 951, 954, 729 P.2d 426, 429 (Ct. App. 1986). The law in New York is the same as Idaho, "However, the defendants appeared voluntarily and failed to object to jurisdiction in their answer. This precludes them from raising a defense at this time." *Roseman v. McAvoy*, 92 Misc.2d 1063, 1064, 401 N.Y.S.2d 988, 989 (1978). Therefore, as a matter of law, Larry voluntarily appeared in the New York case and voluntarily submitted to the personal jurisdiction of the court.

The defendant appears in an action when he answers, demurs, or gives the plaintiff written notice of his appearance, or when an attorney gives notice of appearance for him." *Pittenger v. A.L. G. Barnes Circus*, 39 Idaho 807, 230 P. 1011 (1924). A general appearance is the equivalent of a "voluntary" appearance. This Court has explained in detail:

> The service of the summons confers the court with personal jurisdiction over a party. *Engleman v. Milanez*, 137 Idaho 83, 84, 44 P.3d 1138, 1139 (2002). The filing of a notice of appearance by a party is equivalent to the service of process upon that party. *Id.* Idaho Rule of Civil Procedure 4(i) provides that the voluntary appearance or service of any pleading by a party constitutes submission to the personal jurisdiction of the court. *Id.* Thus, the voluntary appearance by a party is equivalent to service of the summons upon that party. *Id.*
>
> Rule 4(i) further provides that the voluntary appearance o service of any pleading by a party constitutes voluntary submission to the personal jurisdiction of the court 'except as provide herein.' It then lists three exceptions. First, filing a motion under Rule 12(b)(2), (4) or (5) does not constitute a voluntary appearance. Second, filing a motion asserting any other defense does not constitute a voluntary appearance if it is joined with a motion under Rule 12(b)(2)(4) or (5). Finally, filing a pleading and defending the lawsuit does not constitute a voluntary appearance if it was done after the trial court has denied the party's motion under Rule 12(b)(2), (4), or (5).

Lohman v. Flynn, 139 Idaho 312, 318, 78 P.3d 379, 385 (2003). The Notice of Retainer and Appearance filed by Larry's attorney, Keith I. Kadish, Esq., on April 20, 2007, does not contain any assertion that the court lacks personal jurisdiction. In fact, the Notice of Retainer and Appearance specifically provides, "Please note that the Defendant is seeking relief outlined in the attached Schedule A." The Schedule A attached the appearance provides that Larry is requesting the New York Court to grant the following relief:

> Divorcing the parties and dissolving the marital relationship which has heretofore existed.
>
> Awarding Defendant exclusive use and occupancy of the marital residence.
>
> Awarding the Defendant exclusive use and occupancy of the contents of the marital residence.
>
> Awarding Defendant equitable distribution of marital property, including a distributive award to Defendant if required or appropriate to effect such equitable distribution. Declaring Defendant's separate property.
>
> Granting each party the right to resume the use of any maiden name or other pre-marriage surname.
>
> Awarding the Defendant such other and further relief as to the court may seem just and proper, together with the costs and disbursements of this action.

(R., Vol. I, pp. 107-08.) Not only does Larry not object to the New York court's jurisdiction over him, but he is requesting the New York court to grant him specific relief. Clearly, the general appearance was voluntary and therefore Larry has voluntarily submitted to the jurisdiction of New York.

The general appearance is binding on Larry. "Idaho appellate courts have long held that civil litigants choose their attorneys and cannot avoid the consequences of their attorney's actions." *Dep't of Health and Welfare v. Conley*, 132 Idaho 266, 271, 971 P.2d 332, 337 (1999), *citing Devault v. Steven L. Herndon, A Professional Ass'n*, 107 Idaho 1, 2, 684 P.2d 978, 979 (1984).

The first Notice of Appearance entered on December 1, 2006, which limited Larry's appearance to child support to custody and support, was superseded by the April 20th general appearance.

The Notice of Appearance filed on December 1, 2006, does not challenge the court's jurisdiction; rather it limits the appearance to custody and support issues. The second Notice of Appearance filed on April 20, 2006, after Larry filed his appeal in Idaho, not only does not challenge the jurisdiction of the court, but in no way limits the appearance. Furthermore, as set forth above, it clearly provides that Larry is seeking relief from the New York court on property issues. Therefore, the second general appearance waives any previous limited appearance.

While there does not appear to be authority in Idaho directly on point, a decision from the Supreme Court of Vermont is instructive. In *State v. Van Aelstyn*, 917 A.2d 471 (Vt. 2007), which was a criminal case involving a waiver of counsel. The defendant filed two notices of *pro se* appearance articulating specific limits on his appearance, expressly stating in the second notice that he did not intend to waive his right to counsel. "Defendant's third notice of appearance included no such limit to his appearance or reservation of his right to counsel. Defendant simply stated that he was entering his appearance pro se and requested that copies of all filings be sent to him. The absence of any limitation in the November 29 notice, particularly when defendant had placed limitations in the two previous notices of appearance, reflects a voluntary intent to proceed pro se." *Van Aelstyn*, 917 A.2d at 475 (emphasis added). This same rationale is applicable in this case. The fact that Larry filed a subsequent general appearance, after previously filing a limited one, that set forth specific relief he is requesting from the court

shows that he intended to proceed in New York and voluntarily submitted to the jurisdiction of that court.

IV. CONCLUSION

Claudia respectfully requests this Court to grant her appeal and affirm the magistrate court's November 29, 2006 Order and February 20, 2007 Order and reverse the district court's decision that reversed these orders.

DATED: September 30, 2008

COSHO HUMPHREY, LLP

By: _____
STANLEY W. WELSH
Attorneys for Defendant/Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on the 30th day of September, 2008, a true and correct copy of the within and foregoing instrument was served upon:

James A. Bevis
Jennifer M. Schindele
BEVIS JOHNSON & THIRY, PA
960 Broadway, Ste. 220
Boise, Idaho 83701

- [x] U.S. Mail
- [x] Hand Delivery
- [ ] Overnight Courier
- [ ] Facsimile
- [ ] Email

STANLEY W. WELSH